

New Takeover Regulations in Germany as of January 2002

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While the SEC in the U.S. had promulgated detailed regulations on tender offers¹ more than 30 years ago under the Williams Act (1968), no such regulatory scheme existed in Germany until the German legislator enacted the new Takeover Act (“Wertpapiererwerbs- und Übernahmegesetz,” WpÜG) as of 01 January 2002.

Before that date, the so-called Takeover Codex² was in force; however, its application was based on a voluntary self-obligation of publicly traded companies, similar to the “*City Code on Takeovers and Mergers*” in the United Kingdom. Though both recent hostile takeover battles (Vodafone / Mannesmann and INA Holding / FAG Kugelfischer) were governed by the Takeover Codex, and acceptance of the Codex was a prerequisite for a new listing in the “Neuer Markt” and the DAX, MDAX and SDAX index, only about 550 of more than 900 publicly listed companies in Germany had subjected themselves to the Takeover Codex. Therefore the enactment of the new regulations is an important step to an efficiently regulated takeover practice.

Unfortunately, the planned European Takeover Regulations (“*Übernehmerichtlinie*”) ended in a stalemate in the European Parliament (273:273 votes); in particular Germany was opposed to the proposed European regulations as they were considered too liberal giving little leeway for German companies to defend themselves against hostile takeover offers.

The new laws embody most of the provisions of the Takeover Codex, however, provide for a more detailed takeover procedure. The main features of the new Act are the following:

¹ In particular Regulation 14-D and 14-E.

² Übernahmekodex der Börsensachverständigenkommission.

Applicability. The regulations are applicable to all tender offers for securities issued by companies that are publicly listed on a German stock exchange. Some of the provisions for the protection of the target company's shareholders, however, apply only to takeover offers; such an offer is one that is directed at the acquisition of a controlling interest in the target company, i.e., the acquisition of 30% or more in the target company. Provisions that apply to takeover offer only are namely minimum price regulations and limitations on defensive tactics. Other provisions are applicable to all tender offers, in particular provisions relating to transparency and disclosure, and equal treatment of the target shareholders.

Transparency. The takeover procedure shall be highly transparent. The shareholders of the target company are to receive a broad amount of information about the bidder, the offer and its terms, and the future business policy of the acquirer regarding the target company, its workforce and industrial locations. Those disclosures along with the terms of the offer shall be published in a prospectus. Moreover, the board of the target company has to publish a statement reflecting its unbiased opinion on the offer.

Minimum Price Regulations. In the case of a takeover offer, i.e., if the acquirer intends to acquire a controlling interest of 30% or more in the target, the offer price may not fall below the weighted average of the target's stock price over the three months preceding the offer. The consideration may be offered only in the form of cash in Euros or liquid publicly traded stock of the acquirer.

Equal Treatment. The offer must grant the same terms to all shareholders of the target company. If the acquirer pays a higher consideration before or after the accomplishment of the tender offer for securities of the target company, it has to improve the offer and to pay the same price to all the shareholders who had accepted the offer ("Nachbesserung").

Neutrality. The board of the target offer shall be neutral towards a tender offer and leave the decision to accept the offer exclusively to the target's shareholders. Defensive tactics in order to obstruct the offer are allowed only in very limited circumstances, i.e., advertising campaigns and those defensive steps that are authorized by the target's shareholders' meeting or the supervisory board. Advertising campaigns were the major defensive tactics in past takeover battles in Germany. E.g., the expenses for the advertising campaigns in the Mannesmann / Vodafone takeover battle supposedly cost more than € 300 million. A shareholder that filed a motion for a temporary

restraining order to enjoin the Mannesmann management from continuing the advertising campaign against the offer lost in court that ruled that the Mannesmann management did not go beyond its management responsibilities.³ Those advertising campaigns are in most instances in the best interests of the target's shareholders as they result in an improvement of the bid. E.g., INA Holding improved its tender offer from € 11 to € 12 in the takeover battle.

Mandatory Bids (Pflichtangebot). If a shareholder acquires a controlling interest in a company (at least a 30% stake) other than by means of a public tender offer it has to make a mandatory public bid to all minority shareholders.

Squeeze-Out Procedure. Under previous regulations majority shareholders had no right to formally freeze out minority shareholders, except for a "cold freeze-out", e.g., by a delisting of the company. The new law allows a majority shareholder owning at least 95% of the voting rights a "squeeze out" of the minority shareholders, whereby the majority shareholder has to offer a fair consideration to the minority shareholders for their shares. The amount of consideration offered by the majority shareholder is subject to judicial review upon appeal of the minority shareholders.

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³ Landgericht Düsseldorf, AG 2000 p. 233 (14 December 1999); though this case was adjudicated under the Takeover Codex before enactment of the new Takeover Act, the principles of this court decision should equally apply in the new legal situation.